86-809

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ERNEST PAGE,

PETITIONER,

VS.

ORANGE COUNTY, FLORIDA AND

JIM SMITH, ATTORNEY GENERAL,

STATE OF FLORIDA,

RESPONDENTS.

****

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

****

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AS AMICUS CURIAE

ERNEST PAGE
In Proper Person
1925 Ivey Lane
Orlando, FL 32811
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FOR PETITIONER

QUESTIONS PRESENTED

Article 1, Section 9, Clause 2 of the United States Constitution was restated by this Court in Harris vs. Nelson, 394 U.S. 286 (1969): "*The Privilege of the Writ of Habeas Corpus Shall Not Be Suspended.*" In Payton vs. Rowe, 391 U.S. 54 (1968) and Fay vs. Noia, 372 U.S. 397 (1963) this Court also held that the Office of the Writ must provide an efficacious remedy, that there is no higher judicial duty than to maintain it unimpaired, Bowen vs. Johnston, 306 U.S. 19 (1939) and unsuspended, Smith vs. Bennett, 365 U.S. 713 (1961) and should not be permitted to founder in a procedural morass, Prince vs. Johnston, 334 U.S. 266 (1948). An evidentiary hearing must be held when meritorious claims are presented, Townsend vs. Sain, 372 U.S. 443 (1953).

Thus, this case presents the following important questions which cry out for plenary consideration by this Honorable Court:

(1) May a Court of Appeals summarily deny as frivolous a mandamus petition directed to the District Court when said Court ruled that the habeas claims were meritorious and for in excess of a year and a half, fail or refuse to take any further action?

(2) Does the lower court's action conflict with the decision of this Court as announced in Roche vs. Evaporated Milk Assn., 319 U.S. 21, 26 (1943) which perscribes mandamus in such situations?

(3) Does the *"Privilege"* of filing a petition for writ of habeas corpus and the subsequent refusal to hear it in effect amount to a suspension of that "privilege."

(4) Since the judicial branch of the Government does not have the authority to suspend the Writ of Habeas Corpus does the action of the lower court sanction suspension of the most precious writ and violate the Separation Of Powers Clause of the Federal Constitution found in Article 2, Section 3, Clause 4?

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IN THE

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OCTOBER TERM, 1986

ERNEST PAGE,

PETITIONER,

VS.

ORANGE COUNTY, FLORIDA AND

JIM SMITH, ATTORNEY GENERAL,

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RESPONDENTS.[1]

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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1 The instant petition is ancillary to an application for writ of habeas corpus now pending in the Federal District Court of Orlando, Florida. It challenges a conviction obtained in the state court of Florida. The Honorable G. Kendall Sharp, District Judge ruled that petitioner's claims were meritorious 16 months ago. Upon his refusal to hear the habeas application mandamus proceeding was instituted in the Eleventh Circuit and denied as frivolous.

Thus, it is the District Court's refusal to hear the habeas application and the court of appeal's approval of that refusal which gives rise to the petition sub judice.

While the petitioner is not indigent he could not afford the attorney fees and costs necessary to compile and bring this action. Professor C. S. Davis of the Law Institute has therefore provided his bro bono services and seeks the Court's approval to be designated as Amicus for petitioner.

COMES NOW your Petitioner, ERNEST PAGE, by and through this application and respectfully prays this honorable Court to preserve the sanctity of Habeas Corpus and Article 1, Section 9, Clause 2 of the United States Constitution and issue a writ of certiorari to review the judgment and order of the United States Court Of Appeals for the Eleventh Circuit entered on September 15, 1986.

OPINIONS BELOW

The judgment and order of the United States Court of Appeals for the Eleventh Circuit, issued with the opinion is set forth in the appendix at page (App.1-2). The Court of Appeals final order on a petition for rehearing and suggestion for rehearing en banc is set forth in the appendix at page (App. 3).

For further clarity the judgment and order of the District Court for the Middle District of Florida, Orlando Division is set forth in the appendix at pages (App. 4 thru 7).

JURISDICTION

The Eleventh Circuit's judgment became final on September 15, 1986. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254 (1) and rule 19, Rules Of The Supreme Court as amended in 1980.

STATUTES INVOLVED

The principles of law involved herein

are found in Title 28 U.S.C.A. § 2243 and Article 1, Section 9, Clause 2 of the United States Constitution. Section 2243 of the Habeas Corpus Act states in pertinent part: "...When the Writ or order is returned a day shall be set for a hearing, not more than five days after the return unless for good cause additional time is allowed...The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Article 1, Section 9, Clause 2 of the Federal Constitution states: "The Privilege Of The Writ Of Habeas Corpus Shall Not Be Suspended unless in time of war or public rebellion."

STATEMENT OF CASE

On March 28, 1984 your petitioner was convicted in the state court of Orange County, Florida, after a jury trial on six counts of grand theft. Page was thereafter sentenced to cummilative prison terms which totaled (15) years. However, the ensuing sentences were broken down under the state supreme court's new sentencing guidelines: Fifteen (15) years supervised probation with the first (51) weeks in the Orange County Jail, 1000 hours of community service and a $9,000.00 fine. Appeal was immediately taken to the Fifth District Court of Appeals in Daytona Beach, Florida, and thereafter denied without opinion. The Petitioner then sought certiorari in the state supreme court but because of a 1980 amendment to the state constitution the court was powerless to review the conviction. On July 17, 1985 Page filed his application for writ of habeas corpus in the federal district court in Orlando, Florida.

Four days later the district court, Judge G. Kendall Sharp, dismissed ground one of the petition holding that it was merged into ground three. (App. 3-4). The Court issued its order to show cause within (60) days directing the State of Florida to transmit the entire record on appeal and finding merit to Page's claims ordered a response thereto. (App. 3-4).

Each and every claim raised in the petitioner's habeas application was exhausted in the state appellate courts. Although late, the state did respond but refused to answer all of the claims raised by petitioner, refused to transmit the entire record as ordered and asserted that (60) days was not sufficient time to properly show cause.[2]

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2 The various pleadings referred to throughout this brief are very voluminous and if appended would exceed the number of pages alloted by the Rules. Should this Court permit or require any other pleadings in its consideration of

this application the petitioner would amend his appendix.

On July 29, 1985 petitioner filed his motion for reconsideration and rehearing as to the denial of bail and the dismissal of ground one. On September 30, 1985, after the state filed its inadequate Return, Page filed his motion to deem allegations admitted and sought to have the state held in default. In this pleading the petitioner pointed out to the court that respondent had failed to answer all of the claims raised in the habeas application, refused to transmit the record as ordered and was already given more than sufficient time to properly comply with the court's order.

After receiving no answer from the court as to the above styled motions, which included requests for an evidentiary hearing, petitioner, on March 27, 1986 filed his Motion For Rule To Show Cause for the respondents failure to properly

show cause why the application for writ of habeas corpus should not issue.

The District Court found petitioner's constitutional claims meritorious based upon the following allegations: (1) The State court magistrate who issued the search warrants directed against Mr. Page entered into a written contingency agreement with the state's main witness (a multi-convicted felon then facing 55 years in prison) and the police department to reduce the witness' possible prison exposure from 55 years to 51 *weeks*, and immediate release from jail on an offense for which no bond was allowed *if* and only *if*, the convict cooperated with the prosecutor and police and *successfully* gathered sufficient evidence for an indictment and testified as the state's main witness at trial. It was, and is, the petitioner's contention that the search warrants were invalid as a result of the issuing magistrate's destroyed neutrality and detachment.

(2) The state court prosecutor, seconds before the jury was sworn during the first criminal trial, entered a nolle prosequi to all charges because he was dissatisfied with the trial judge and the jury because it contained a black person. (Petitioner is black).

(3) The crime was manufactured. The Petitioner was an otherwise law abiding public servant. The State manufactured an otherwise nonexistant crime using over $20,000 of public funds for the sole purpose of affording a pretext for arrest, indictment, conviction and removal from public office.

(4) During the second trial the prosecutor per-emptorily challeged each of the three black jury members solely because they were black. Petitioner immediately objected and asked the trial judge to require the prosecutor to give his reasons.

(5) Section 3 (b)(3) of the Florida Constitution violates the equal protection

and due process clause of the federal constitution in that it invidiously discriminates between the classes of people who may petition the state supreme court for review of federal constitutional claims.

Petitioner served interrogatories upon the respondent inquiring as to why they still refused to comply with the district court's order to show cause. On February 6, 1986 Page filed his objection to the Magistrate's improper intervention when he granted a protective order to the respondents from petitioner's interrogatories.

On July 19, 1986 petitioner filed his application for mandamus in the Court of Appeals alleging inter alia that the privilege of the writ of habeas corpus had been suspended in his case due to the District Court's refusal to proceed on the habeas action while admittingly valid constitutional claims were pending for over

a year. On August 14, 1986 the Court of Appeals for the Eleventh Circuit denied the petition for writ of mandamus with the opinion "frivolous." (App. 1-2).

On August 23, 1986 Page timely filed his petition for rehearing and suggestion for rehearing en banc which was denied on September 15, 1986. (App. 3).

As of the writing of this petition the District Court, G. Kendall Sharp, has failed or refused to enter any orders on the petitioner's meritorious habeas application. The time elapsed is one year and two months.

REASONS FOR GRANTING WRIT

Since this Court's decision in Harris vs. Nelson, 394 U.S. 286 (1969) it has not had occasion to address such fundimental issues as the suspension of the privilege of filing a writ of habeas corpus. In fact, the Harris decision only mentions the prohibition contained in Article 1, Section 9, Clause 2 of the Federal Constitution in dictum which pivoted around the propriety of propounding interrogatories to a respondent in a habeas proceeding. There has been no decisive opinions which interpret just what the *privilege* of habeas corpus means.

By analogy this Court has many times said that the constitutional right to court access and due process of law is a *meaningful* opportunity to settle one's grievances before the judiciary. The right to petition for a writ of habeas corpus is contained in Title 28 U.S.C.A. §2254. That right and bona fide privilege shall not be abridged

unless in time of war or public rebellion and only then by the legislature or the president of the United States. Art. 1, Sec. 9, Cl. 2.

Nine years ago this Court in Blackledge vs. Allison, 431 U.S. 63 (1977) held that a habeas petitioner is entitled to no less that careful consideration and plenary processing of his claims including a full opportunity for presentation of the facts. In Will vs. United States, 389 U.S. 90 (1967), and Roche vs. Evaporated Milk Assn., 319 U.S. 21 (1943) this Court has directed that the peremptory writ of mandamus should issue to confine an inferior court to the lawful exercise of its perscribed jurisdiction or to compel it to exercise its authority when it has a duty to do so. Every person, this petitioner included, is entitled to equal application of the law. The law clearly states that the writ of habeas corpus and its privilege has no higher priority on any judicial calendar.

In Smith vs. Bennett, 365 U.S. 708 (1961) a habeas petitioner was refused the privilege of filing his habeas corpus petition as a result of indigency. On Certiorari to this Court Justice Clark delivered the opinion for which the entire Court joined.

This Court opined that it will "...not quibble...it is the highest remedy at law for any man that is imprisoned...Considered by our Founders as the highest safeguard to liberty, it was written into our Constitution that its privilege shall not be suspended... There is no higher duty than to maintain it unimpaired." Citing Bowen vs. Johnston, 306 U.S. 19 (1936).

In the Smith, supra, decided on appeal from the state courts of Iowa it was also said:

> ...it would ill-behoove this great state, whose devotion to equality of rights is indelibly stamped upon its history to say to its indigent prisoners..."Go to the federal court."

And so it was in the instant case.

Petitioner Page brought his federal claims to the state appellate court and on to its supreme court. Based upon the same claims the federal district court found to contain merit each state court summarily denied relief without opinion. This is so because if any opinions were rendered premised upon existing federal standards the conviction suffered by your petitioner would have been reversed and councilman Page returned to office.

In habeas corpus proceedings instituted more than fifteen (15) months ago in the District Court in and for Orlando, Florida, the federal court found merit to Page's assertions and ordered the state to show cause. (App. 3-4). Instead of supplying the Court with the "full record on appeal" the respondents fowarded 1/40th of the record compiled out of context and containing none of the record necessary to determine the claims raised by petitioner. Motions for contempt, default, rule to show cause and

an evidentiary hearing were filed. For almost sixteen (16) months the district court has failed to act on any of the pleadings or the claims it found to contain merit.

Mandamus proceedings were instituted in the Eleventh Circuit Court of Appeals outlining each and every instance of the lower court's failure or refusal to act. Page's mandamus application was summarily denied as "fivolous." (App. 1). Petition For Rehearing and Suggestion For Rehearing En Banc was timely filed and also summarily denied. (App. 2).

This Court in Panama Canal Company vs. Grace Line, Inc., 356 U.S. 309 (1958) found reason to address Section 1651 of the All Writs Act. There, this Court citing Harmon vs. Bruckner, 355 U.S. 579 (1959), held that were an agency is derelict in failing to act then judicial relief is available through mandamus proceedings. In Honorable Walter J. La Buy vs. Howes Leather Company, 352 U.S. 249 (1957), this Court affirmed the decision of the Seventh Circuit issuing a writ of

mandamus to the District Court. Here again, this Court stated that mandamus should lie to direct a district judge to refrain from violating, or force to comply with, rules of law handed down by this Court.

This Court, as cited above, has steadfastly enforced the congressional and constitutional intent of our Founders and law makers in factual situations like the one present here. Title 28 U.S.C.A. §2243: "Within (5) days a hearing shall be set after respondent's Return is filed with the court:

> The Court shall hear and determine the facts, and dispose of the matter as law and justice require.

Article 1, Section 9, Clause 2 of the United States Constitution prohibits the suspension of the privilege unless the Country is engaged in war or domestic rebellion. It is clear that the right to any constitutional privilege means the right to *meaningfully* exercise it. Here, that right has been denied to your petitioner.

In the instant case the "privilege" of filing the application for writ of habeas corpus is tantamount to a suspension of same because the *meritorious* application along with the Return, for over (14) months is naught but collecting dust and turning yellow with age.

Over a century ago this Court was faced with the opposite set of facts. In Ex Parte Milligan, 71 U.S. 2 (1866) the "privilege" was suspended during the Civil War. However, this Court held that the "suspension of the privilege" did not suspend the writ itself and that it should be considered and issue in due course. One hundred and seventy nine years ago in Ex Parte Bollman, 8 U.S. 75 (1807) and this century in such cases as Application of Yamashita, 327 U.S. 1 (1946), this Court has ruled that only the Legislature may authorize the President to suspend the privilege of the Writ of Habeas Corpus.

It logically appears then that the District Court's refusal to conduct proceedings on the writ petition and the Court

of Appeals for the Eleventh Circuit's implied approval of this refusal amounts to a clear usurption of the power vested solely in the legislative branch of government and consequently violates the Seperation Of Powers clause of the federal constitution contained in Article 2, Section 3, Clause 4. Rabinowitz vs. United States, 366 F.2d 34 (CCA 5 1966), United States vs. Darby, 312 U.S. 100 (1941), U.S. vs. Georgia Public Service Commission, 371 U.S. 285 (1963) and McClain vs. Commissioner of Internal Revenue, 311 U.S. 527 (1941).

This Court in Harris, supra, citing the meaning of the All Writs Act said that our courts should issue any writ necessary where their duty requires it and that this duty is an "inescapable obligation." If the "privilege" of the Writ of Habeas Corpus has any meaning as this Court when interpreting Article 1, Section 9, Clause 2 says it does then only one conclusion lies.

That is, Certiorari should be granted by this Court and the judgment of the Court of Appeals for the Eleventh Circuit reversed with an ensuing order directing the Writ of Mandamus to issue.

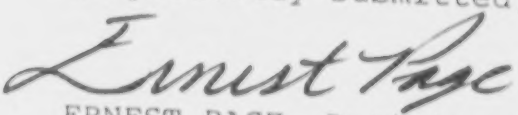
CONCLUSION

THE COURT OF APPEALS SHOULD HAVE ISSUED THE WRIT OF MANDAMUS IF FOR NO OTHER REASON THAN TO AID ITS JURISDICTION. SHOULD THE PETITIONER HAVE BEEN SUCCESSFUL THE STATE OF FLORIDA COULD NOT APPEAL FROM THE DISTRICT COURT'S DECISION. VISE-VERSA, THE PETITIONER COULD NOT. THIS COURT, SINCE THE JUDICIARY ACT OF 1789 HAS JEALOUSLY SAFEGUARDED THE SANCTITY OF CONSTITUTIONAL PRINCIPLES THE WRIT OF HABEAS CORPUS WAS DESIGNED TO PROTECT. THIS COURT SHOULD ONCE AND FOR ALL RESOLUTELY SET ITS FACE PRESERVING THE UNHAMPERED AVAILABILITY OF THE PETITION FOR WRIT OF HABEAS CORPUS BY DIRECTING THE COURT OF APPEALS TO ISSUE THE WRIT OF MANDAMUS INSTANTER.

IN THE ALTERNATIVE, THIS COURT SHOULD RECOGNIZE THE DENIAL OF MEANINGFUL COURT ACCESS SUFFERED BY YOUR PETITIONER FROM THE STATE OF FLORIDA COURTS OF APPEAL AS WELL AS THE LOWER FEDERAL COURTS AND EXERCISE ITS SUPERVISORY POWERS, ORDER UP THE RECORD, AND GIVE PLENARY CONSIDERATION TO YOUR

PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS.

Respectfully Submitted,



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PROOF OF SERVICE

ERNEST PAGE, on oath deposes and states that on the 15th day of November, 1986, three copies of the Petition For Writ of Certiorari were served by First Class Mail, postage prepaid, on U.S. Court of Appeals, 11th Cir., 50 Spring St. S.W., Atlanta, Ga. 30303, & Hon. G. Kendall Sharp, U.S. Dist. Court, M.D., Orlando, Fla. 32801 and that all parties required to be served have been served: Margene Roper, Ass't A.G. of Fla. 125 N. Ridgewood Ave. Daytona Beach, Fla. 32014

ERNEST PAGE, Petitioner
In Proper Person
1925 Ivey Lane
Orlando, FL 32811
(305) 425-3383

Subscribed and sworn to before me this 14 day of November, 1986.

Notary Public

Notary Public, State of Florida at Large
My Commission Expires Apr. 9, 1988
BONDED THRU HUCKLEBERRY, SIBLEY & HARVEY INSURANCE & BONDS, INC.

My Commission Expires: _____

APPENDIX

UNITED STATE COURT OF APPEALS

ELEVENTH CIRCUIT

50 SPRING STREET, S.W.

ATLANTA, GEORGIA 30303-3147

No. 86-3443

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED

AUGUST 14, 1986

MIGUEL J. CORTEZ
CLERK

IN RE:

ERNEST PAGE,

PETITIONER.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BEFORE KRAVITCH, ANDERSON AND EDMONDSON, CIRCUIT JUDGES.

BY THE COURT:

THE PETITION FOR WRIT OF MANDAMUS IS DENIED AS FRIVOLOUS.

ISSUED As & FOR MANDATE: AUGUST 14, 1986.

UNITED STATE COURT OF APPEALS

Eleventh Circuit

50 Spring Street. S.W.

Atlanta, Georgia 30303-3147

September 15, 1986

TO ALL PARTIES LISTED BELOW:

No. 86-3443 In Re: Ernest Page

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

XX No member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ, CLERK

By: /s/ Linda Pritt
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 85-767-CIV-ORL-

ERNEST PAGE,

Petitioner,

vs.

ORANGE COUNTY, FLORIDA, et al.,

Respondents.

_____/

ORDER

Together with this application for writ of habeas corpus pursuant to 28 U.S.C. §2254, petitioner has filed a motion for enlargement on bail. Despite the lack of specific authority, it is within this Court's inherent power to enlarge a state prisoner on bail pending disposition of a writ of habeas corpus. In re Wainwright, 518 F.2d 173 (5th Cir. 1975). Having reviewed this motion and the entire file, the Court concludes that petitioner has not made a sufficient showing to merit

such extraordinary relief. See Zona vs. Roberts, 469 F.Supp. 258 (M.D. Fla. 1979). Accordingly, it is ORDERED that petitioner's motion for bail is hereby DENIED.

The Court has reviewed the instant petition for arguable merit pursuant to Rule 4 of the Rules Governing Section 2254 Proceedings. In gound 1, petitioner claims his conviction was obtained by use of evidence gained pursuant to an illegal search and seizure. This ground is based on the same facts as ground 3, in which petitioner alleges a denial of due process "fundamental fairness." While the facts alleged do not, without more, appear to trigger Fourth Amendment concerns, it is clear that to the extent search and seizures are involved, petitioner had a full and fair to litigate such issues in the state courts within the meaning of Stone vs. Powell, 428 U.S. 465 (1976), so as to preclude federal habeas review. Ground 1, accordingly, is

without merit and must be dismissed.

As to the other grounds raised in this petition, it is ORDERED:

That the respondents, Superintendent of the Orange Counth Jail and the Attorney General of the State of Florida, or their authorized representatives, are hereby directed to file herein within sixty days (60) days from the date of this order, a written response to the petition showing cause why the writ of habeas corpus should not be issued. The response shall include a copy of the full record of trial, and any orders, briefs, or motions which relate to any direct appeal or other post-conviction motions petitioner may have filed in state court regarding the subject conviction. Upon receipt of a response, the Court will determine if a hearing is required.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22 day of July, 1985.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

Copies To:

Mr. Ernest Page
Warden Charles Brookfield, Orange County Jail
Honorable Jim Smith, Attorney General,
Tallahassee, Fl.
Office of the Assistant Attorney General,
Daytona Beach, Fl.

COPIES MAILED

ON 7-22 19 85

BY /s/ NB
Deputy Clerk